BODCO ENGINEERING AND CONSTRUCTION SDN BHD v. TRIBUNAL FOR HOUSING PURCHASER CLAIMS & ORS

COURT OF APPEAL, KUCHING
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
IDRUS HARUN JCA
[CIVIL APPEAL NO: Q-01-172-05-2014]
9 MAY 2017

CONTRACT: *Sale and purchase agreement – Housing developers – Breach of contract – Late delivery of vacant possession – Provision in contract for payment of agreed liquidated and ascertained damages ('LAD') for late delivery of vacant possession – Whether 'date of completion' delivery of completed and habitable building fit for human occupation – Whether mere delivery of vacant possession of property by way of giving notice of vacant possession no longer sufficient to constitute completion – Whether right of occupation conferred upon purchasers – Whether computation of LAD should commence within 24 months from date of sale and purchase agreement until date of issuance of occupation permit*

CONTRACT: *Housing developers – Damages – Claim for liquidated and ascertained damages ('LAD') – Computation of – Late delivery of vacant possession – Provision in contract for payment of agreed liquidated and ascertained damages ('LAD') for late delivery of vacant possession – Whether 'date of completion' delivery of completed and habitable building fit for human occupation – Whether mere delivery of vacant possession of property by way of giving notice of vacant possession no longer sufficient to constitute completion – Whether right of occupation conferred upon purchasers – Whether computation of LAD should commence within 24 months from date of sale and purchase agreement until date of issuance of occupation permit*

The second and third respondents ('the respondents') entered into a sale and purchase agreement ('the SPA') for the sale and purchase of a single storey semi- detached house ('the property') from the appellant, a licensed housing developer. Pursuant to cl. 17(1) and (2) of the SPA, the property shall be completed by the appellant and the appellant was to deliver vacant possession of the same to the second and third respondents within 24 months from the date of the execution of the SPA *ie*, on 11 August 2008. In the event of failure to deliver the property within the stipulated time, the appellant shall pay the second and third respondents liquidated agreed damages ('LAD') to be calculated pursuant to the SPA. However, the property was only completed on 20 April 2010. Pursuant to cl. 19(1) of the SPA, the appellant then delivered vacant possession of the said property to the second and third respondents *vide* letter dated 21 April 2010. The appellant then applied for the issuance of occupation permit ('OP'). The appellant then issued another notice to take vacant possession of the property on 17 May 2011. However, the second and third respondents refused to take vacant

possession of the same. On 8 June 2011, the appellant was informed that their application for OP could not be approved and they were required to rectify all the defects. The OP for the property was finally issued on 14 November 2012. The appellant was late in the delivery of vacant possession of the said property to the second and third respondents thus both the respondents filed their claim for LAD to the Tribunal ('the first respondent') for the late delivery of vacant possession of the said property from the completion date to the date of delivery of vacant possession of the said property, pursuant to cl. 17(1), (2) and (3) of the SPA. The first respondent, however, computed the LAD from the initial completion date *ie*, 11 August 2008 to the date of issuance of occupation permit *ie*, on 14 November 2012. Dissatisfied with the aforesaid award, the appellant filed this application for judicial review under O. 53 of the Rules of Court 2012 to review and quash the first respondent's award. The High Court dismissed the appellant's application and ruled that the meaning of 'the date of completion' in cl. 17(2) of the SPA was the date that the OP was issued under cl. 20 of the SPA. Hence, the appellant appealed. It was the submission of the appellant that under cl. 17(1) and 17(2), that the appellant was only under an obligation to complete the building and to hand over vacant possession of the same pursuant to cl. 19(2) of the SPA, and that the sixth schedule of the SPA which referred to cl. 17(2) stated that the 'pre-estimated liquidated damages' payable under the SPA was for payment by vendor in default of handing over of vacant possession and not failure to give the right of occupation. This payment of LAD, according to the appellant, only extended from the initial completion date until the date of issuance of Certificate of Practical Completion ('CPC') under cl. 19(1) and not until the date of issuance of OP under cl. 20. The appellant also argued that cl. 17(3) was not a final and conclusive clause and it was only a deeming provision creating rebuttable presumption. The issue for determination was whether the computation of the LAD should commence within 24 months from the date of the SPA (11 August 2008) until the date of delivery of vacant possession of the property under cl.17 (21 April 2010) or within 24 months from the date of the SPA (11 August 2008) until the date of the issuance of the OP under cl. 20 (14 November 2012) of the SPA. At the case management stage, the parties agreed to hear the present appeal together with four other appeals on account that these appeals involved the same parties and shared common and identical issues for determination. The parties agreed that only the present appeal was to be litigated and its outcome was to bind the other four appeals.

Held (dismissing instant appeal and correspondingly allowing four related appeals by Tribunal)

Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The SPA, in particular cl. 17(3), was not a mere agreement between two contracting parties but a statutorily sanctioned provision. The SPA is substantially governed by Regulation II and Sch. G of the Housing

Developers (Control and Licensing) Regulations 1988 ('HDCL Regulation'). They are actually provisions of Sch. H that had been imposed by law upon the parties and hence, are statutory provisions in that sense. (para 37)

(2) Clause 17(3) of the SPA is not there as a decorative item nor a product of verbosity. The formula in the said cl. 17 was determined by the State Cabinet of Sarawak, led by its State Minister of Housing, designed to protect home buyers after balancing the interests of the buyers and developers in Sarawak. It was meant to be implemented and executed in the event of breaches in respect of cl. 17(1) and (2). Hence, it was only appropriate to adopt in all the circumstances of the case, an interpretation that was in accord with s. 17A of the Interpretation Acts 1948 and 1967 ('Interpretation Acts'). (para 38)

(3) The appellant's submission that the LAD was to be paid only from 11 August 2008 until 21 April 2010 when vacant possession of the said property was delivered offended s. 17A of the Interpretation Acts. To accept such argument was to make nonsense of the purpose of the HDCL Regulations or rather its parent Act, the Housing Developers Act and would render the said cl. 17(3) of the SPA obtuse and redundant, defeating the paramount objective of inserting the said provisions into the SPA. The purport of cl. 17(3) of the SPA was plain and clear. It strengthened the scope of cl. 17(2) by offering a definitive meaning of 'the date of completion of the said building' appearing therein. It simply meant that what amounted to 'date of completion' now was the delivery of a completed and habitable building fit for human occupation together with the Certificate of Fitness or Occupation (CF) issued under cl. 20 of the SPA. (paras 39-41)

(4) The mere delivery of vacant possession of the said property by way of giving notice of vacant possession to the buyers under cls. 19(1) and (2) was no longer sufficient to constitute completion. The requirement has now been modified in favour of the house buyers, providing additional protection from further victimisation by unscrupulous developers by the insertion of cl. 17(3) which reflected the will of the contracting parties. (para 42)

(5) The further consequential effect of applying or subjecting cl. 17(3) of the SPA to the provision of cl. 19(1) would be the enlargement or improvement of the terms of the SPA, favouring only one side of the divide, leaving the home buyers out in the cold. It would equally offend the purport of HDCL Regulation and oust the primary purpose of having cl. 17(3) in the agreement. This surely could not be the intention of the parties when they entered the SPA. (para 47)

(6) The right of occupation was conferred upon the second and third respondents by virtue of cl. 17 wherein the appellant was encumbered not only to deliver vacant possession of the said property within

A 24 months from the date the SPA was entered under cl. 17(1) but also, under cl. 17(3) to procure the issuance of the certificates stipulated under cl. 20 within the same period. Only then was the property considered fit for occupation and could hence be legally occupied. Anything less than these would infringe the SPA and the appellant was liable to pay
B damages as the second and third respondents could not legally enjoy the use of the property. Hence, there was no basis for the appellants to say that cl.17 of the SPA did not confer any right of occupation of the said property to the second and third respondents. (para 53)

Bahasa Malaysia *Headnotes*

C
Responden kedua dan ketiga ('responden-responden') memasuki perjanjian jual beli ('PJB') untuk membeli rumah berkembar satu tingkat ('hartanah') daripada perayu, pemaju rumah berlesen. Menurut kl. 17(1) dan (2) PJB, hartanah itu harus disiapkan oleh perayu dan perayu akan menyerahkan milikan kosong kepada responden kedua dan ketiga dalam tempoh 24 bulan
D dari tarikh pelaksanaan PJB iaitu 11 Ogos 2008. Sekiranya berlaku kegagalan untuk menyerahkan hartanah dalam tempoh yang ditetapkan, perayu akan membayar kepada responden kedua dan responden ketiga 'ganti rugi jumlah yang disetujui' ('LAD') untuk dikira menurut PJB. Walau bagaimanapun, hartanah hanya siap pada 20 April 2010. Menurut kl. 19(1) PJB, perayu
E kemudiannya menyerahkan milikan kosong hartanah itu kepada responden kedua dan ketiga melalui surat bertarikh 21 April 2010. Perayu seterusnya memohon pengeluaran permit penghunian ('OP'). Perayu mengeluarkan lagi satu notis untuk milikan kosong hartanah pada 17 Mei 2011. Walau bagaimanapun, responden kedua dan ketiga enggan mengambil milikan
F kosong. Pada 8 Jun 2011, perayu dimaklumkan bahawa permohonan OP mereka tidak diluluskan dan mereka perlu membetulkan segala kecacatan. Pada 14 November 2012, OP hartanah itu akhirnya dikeluarkan. Perayu lewat dalam menyerahkan milikan kosong hartanah tersebut kepada responden kedua dan ketiga, oleh itu kedua-dua responden memfailkan
G tuntutan LAD kepada Tribunal ('responden pertama') untuk kelewatan penyerahan milikan kosong dari tarikh penyiapan kepada tarikh penyerahan milikan kosong hartanah tersebut, menurut kl. 17(1), (2) dan (3) PJB. Responden pertama, walau bagaimanapun, telah mengira LAD dari tarikh siap iaitu 11 Ogos 2008 hingga tarikh pengeluaran permit penghunian iaitu
H 14 November 2012. Tidak berpuas hati dengan award yang diberikan, perayu memfailkan permohonan ini untuk semakan kehakiman bawah A. 53 Kaedah-Kaedah Mahkamah 2012 untuk menyemak semula dan membatalkan award responden pertama. Mahkamah Tinggi menolak permohonan perayu dan memutuskan bahawa maksud 'tarikh siap' dalam kl. 17(2) PJB adalah tarikh OP dikeluarkan bawah kl. 20 PJB. Oleh itu,
I perayu merayu. Perayu menghujahkan bawah kl. 17(1) dan 17(2), perayu hanya bertanggungjawab untuk menyiapkan bangunan dan menyerahkan

milikan kosong menurut kl. 19(2) PJB, dan bahawa jadual keenam PJB yang merujuk pada kl. 17(2) menyatakan bahawa 'ganti rugi pra-anggaran' yang perlu dibayar bawah PJB adalah untuk bayaran oleh vendor yang mungkir dalam penyerahan milikan kosong dan bukan kegagalan memberikan hak penghunian. Bayaran LAD ini, menurut perayu, hanya dilanjutkan dari tarikh siap awal sehingga tarikh pengeluaran 'Certificate of Practical Completion' ('CPC') bawah kl. 19(1) dan bukan hingga tarikh pengeluaran OP bawah kl. 20. Perayu juga menghujahkan bahawa kl. 17(3) bukan klausa yang akhir dan muktamad dan ia hanyalah menyifatkan peruntukan yang mewujudkan anggapan yang boleh disangkal. Isu yang perlu diputuskan adalah sama ada pengiraan LAD harus bermula dalam tempoh 24 bulan dari tarikh PJB (11 Ogos 2008) sehingga tarikh penyerahan milikan kosong hartanah bawah kl. 17 (21 April 2010) atau dalam tempoh 24 bulan daripada tarikh PJB (11 Ogos 2008) sehingga tarikh pengeluaran OP bawah kl. 20 (14 November 2012) PJB. Di peringkat pengurusan kes, pihak-pihak bersetuju untuk mendengar rayuan ini dengan empat rayuan lain atas dasar bahawa rayuan-rayuan melibatkan pihak-pihak yang sama dan berkongsi isu am dan sama untuk diputuskan. Pihak-pihak bersetuju bahawa rayuan ini akan dilitigasikan dan keputusannya akan mengikat keempat-empat rayuan yang lain.

Diputuskan (menolak rayuan ini dan membenarkan keempat-empat rayuan berkaitan oleh Tribunal)
Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Perjanjian jual beli, khususnya kl. 17(3), bukan semata-mata perjanjian antara dua pihak yang berkontrak tetapi adalah satu peruntukan yang diperakui secara statutori. Perjanjian jual beli secara substansial dikawal oleh Peraturan II dan Jadual G Peraturan-Peraturan Pemaju Perumahan (Kawalan dan Pelesenan) 1988 ('Peraturan-Peraturan tersebut'). Ini adalah peruntukan-peruntukan Jadual H yang dikenakan oleh undang-undang ke atas pihak-pihak dan dengan itu, adalah peruntukan-peruntukan statutori dalam erti kata lain.

(2) Klausa 17(3) PJB bukanlah item hiasan atau produk lewah. Formula dalam kl. 17 ditentukan oleh Kabinet Negeri Sarawak, yang diketuai oleh Ketua Negeri Perumahan, yang direka bentuk untuk melindungi pembeli-pembeli rumah selepas menyeimbangkan kepentingan pembeli-pembeli dan pemaju-pemaju di Sarawak. Ia bermaksud untuk dijalankan dan dilaksanakan apabila terdapat pelanggaran kl. 17(1) dan (2). Oleh itu, adalah sesuai untuk mengguna pakai dalam segala keadaan kes, satu pentafsiran yang selaras dengan s. 17A Akta-Akta Tafsiran 1948 dan 1967 ('Akta Tafsiran').

(3) Hujahan perayu bahawa LAD harus dibayar hanya dari 11 Ogos 2008 sehingga 21 April 2010 apabila milikan kosong hartanah diserahkan melanggar s. 17A Akta Tafsiran. Untuk menerima hujahan itu adalah untuk memperlekehkan Peraturan-Peraturan ataupun Akta induknya, Akta Pemaju Perumahan dan akan menjadikan kl. 17(3) PJB sia-sia dan berlebihan, mematahkan objektif utama memasukkan peruntukan-peruntukan tersebut ke dalam PJB. Tujuan kl. 17(3) PJB adalah jelas dan nyata. Ini menguatkan skop kl. 17(2) dengan memberikan maksud definitif 'tarikh siap bangunan tersebut'. Ia membawa maksud bahawa apa yang terjumlah kepada 'tarikh siap' sekarang adalah penyerahan bangunan yang sudah siap dan boleh diduduki dan sesuai diduduki oleh manusia bersama-sama dengan Perakuan Kelayakan Penghunian ('CF') yang dikeluarkan bawah kl. 20 PJB.

(4) Penyerahan milikan kosong hartanah tersebut semata-mata dengan memberikan notis milikan kosong kepada pembeli-pembeli bawah kl. 19(1) dan (2) tidak lagi memadai untuk membentuk penyiapan. Keperluan sekarang sudah diubah suai memihak pada pembeli-pembeli rumah, menyediakan perlindungan tambahan daripada pemangsaan selanjutnya oleh pemaju-pemaju tidak berprinsip dengan pemasukan kl. 17(3) yang menunjukkan kehendak pihak berkontrak.

(5) Kesan yang seterusnya akibat menggunakan atau menakluk kl. 17(3) PJB kepada peruntukan kl. 19(1) adalah perluasan dan peningkatan syarat-syarat PJB, yang memihak kepada satu pihak sahaja, dan tidak mengendahkan hak-hak pembeli-pembeli rumah. Ia akan sama sekali melanggar tujuan Peraturan-Peraturan dan mengetepikan tujuan utama menggubal kl. 17(3) di dalam perjanjian. Ini bukanlah niat pihak-pihak apabila memasuki PJB.

(6) Hak menghuni diberikan kepada responden kedua dan ketiga mengikut kl. 17 di mana perayu dipertanggungjawabkan dengan bukan sahaja untuk menyerahkan milikan kosong dalam tempoh 24 bulan dari tarikh PJB di bawah kl. 17(1), tetapi juga bawah kl. 17(3) iaitu untuk memperoleh pengeluaran sijil-sijil yang ditetapkan di bawah kl. 20 dalam tempoh yang sama. Hanya pada masa itu hartanah sesuai untuk pendudukan dan boleh secara sah diduduki. Apa-apa yang kurang daripada itu melanggar PJB dan perayu bertanggungjawab untuk membayar ganti rugi kerana responden kedua dan ketiga tidak dapat menikmati penggunaan hartanah itu dari segi undang-undang. Oleh itu, perayu tidak mempunyai asas untuk menyatakan bahawa kl. 17 PJB tidak memberi apa-apa 'hak penghunian' hartanah tersebut kepada responden kedua dan ketiga.

Case(s) referred to:

Cempaka Finance Bhd v. Ho Lai Ying & Anor [2006] 3 CLJ 544 FC ***(refd)***
Chinaya Ganggaya v. Sentul Raya Sdn Bhd [2008] 3 CLJ 23 HC ***(refd)***
Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd [2002] 4 CLJ 796 HC ***(refd)***
Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong [2014] 8 CLJ 865 CA ***(refd)***
Mature Land Sdn Bhd v. Atlantic Plantation Sdn Bhd [2012] 1 LNS 961 CA ***(refd)***
Maxisegar Sdn Bhd v. Veronica Lee Ha Ling & Ors [2009] 6 CLJ 247 CA ***(dist)***
Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd [2003] 4 CLJ 294 CA ***(refd)***
South East Asia Brickworks Sdn Bhd v. Maria Antonette [1974] 1 LNS 158 HC ***(refd)***
Syarikat Lean Hup (Liew Brothers) Sdn Bhd v. Cheow Chong Thai [1988] 1 LNS 74 HC ***(dist)***
Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd [2009] 6 CLJ 232 FC ***(refd)***

Legislation referred to:

Housing Developers (Control and Licensing) Ordinance 1993 (Sarawak) (Cap 5), ss. 17A, 17J
Interpretation Acts 1948 and 1967, s. 17A
Rules of Court 2012, O. 53

For the appellant - Victor YC Ng; M/s CH Tay & Partners
For the respondent - Talat Mahmood Abd Rashid, Mcwillyn Jiok & Mohd Adzrul Adzlan; State Legal Officer, Sarawak

[Editor's note: Appeal from High Court, Sibu; Application For Judicial Review No: SBW-13-JR-4/8-2013 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ahmadi Asnawi JCA:

[1] There were four other civil appeals of a related nature arising from similar applications for judicial review, scheduled for hearing on the same instant (22 October 2015), namely:

(i) Civil Appeal No. Q-01-475-12-2014

Appellant : Tribunal For Housing Purchaser Claims

Respondent : BODCO Engineering and Construction Sdn Bhd

(ii) Civil Appeal No. Q-01-476-12-2014

Appellant : Tribunal For Housing Purchaser Claims

Respondent : BODCO Engineering and Construction Sdn Bhd

(iii) Civil Appeal No. Q-01-477-12-2014

Appellant : Tribunal For Housing Purchaser Claims

Respondent : BODCO Engineering and Construction Sdn Bhd

(iv) Civil Appeal No. Q-01-478-12-2014

Appellant : Tribunal For Housing Purchaser Claims

Respondent : BODCO Engineering and Construction Sdn Bhd

[2] The court of first instance, the High Court, heard all the four above said applications for judicial review together and delivered a single common decision, favourable to Bodco Engineering and Construction Sdn Bhd ("BODCO"), that applied for all the four applications. Hence, these four appeals by Tribunal for Housing Purchaser Claims ("Tribunal"). The application for judicial review giving rise to the present appeal was, however, heard and decided earlier before another bench of the High Court. The decision nevertheless favoured the Tribunal. Thus, the present appeal by BODCO.

[3] At the case management stage, the parties agreed to hear the present appeal together with the four above said appeals on account that these five appeals involved the same parties (Tribunal for Housing Purchaser Claims and Bodco Engineering and Construction Sdn Bhd) and shared common and identical issues for determination.

[4] Before us, the parties further agreed that only the present appeal is to be litigated and its outcome is to bind the four other appeals. Accordingly, each party had filed common submissions, applicable for all the five appeals, including the present one.

[5] The individual respondents before the High Court in these five appeals (the individual house buyers from the developer, BODCO) have not appealed against the decisions of both the High Courts.

[6] These five appeals, in essence, were all about the computation of liquidated agreed damages ("LAD") owing by the developer, BODCO, to its house buyers for late completion based upon the interpretation of the written contract entered between the developer and the buyers.

[7] On 13 October 2013, the applicant/appellant was granted leave to commence proceedings under O. 53 of the Rules of Court 2012, for the following reliefs:

(i) An order of *certiorari* to remove into the High Court of Sabah and Sarawak at Sibu to quash the award (Case No. TTPRS/0004/13) of the Tribunal for Housing Purchaser Claims delivered on 29 May 2013 by which the Tribunal held that there was a delay of 51 months for the applicant to complete the house and that the second and third respondents ("the claimants") are entitled to a claim of RM20,400 (RM400 x 51 months) being agreed pre-liquidated damages ("LAD");

(ii) A declaration that the LAD under cl. 17(2) of the sale and purchase agreement dated 12 August 2006 ("SPA") should be calculated from the stipulated completion date under the SPA, ie, on 11 August 2008 till the issuance of the notice to take vacant possession ie, on 21 April 2010; and

(iii) An order that the applicant do pay RM8,133.30 to the second and third respondents being the delay of 20 months and ten days in delivering possession of Sub lot 147, Lot 429, Block 11, Seduan Land District.

[8] The grounds upon which the reliefs are sought are:

(i) the Tribunal had committed errors of law and/or acted unlawfully and/or in excess of its jurisdiction or power by basing its decision on irrelevant facts and omitting to address relevant ones in concluding that there was a delay of 51 months for the applicant to complete the house; and

(ii) the Tribunal's decision was jurisdictionally bad for '*Wednesbury* unreasonableness' in that no reasonable court similarly circumstanced would have concluded, on the facts available that there was a delay of 51 months for the applicant to complete the house.

[9] In the event the learned judge dismissed the appellant's application for judicial review with no order as to costs, and correspondingly affirmed the Tribunal's award.

The Background Facts

[10] The second and third respondents had entered in a sale and purchase agreement ("SPA") dated 12 August 2006 for the sale and purchase of a unit of a single storey semi-detached house described as Sub lot 147, Lot 429, Block 11, Seduan Land District, for the sum of RM170,000 ("the property") from the appellant being a licensed housing developer under the Housing Developers (Control and Licensing) Ordinance 1993 ("HDO").

[11] The first respondent is established pursuant to s. 17A of the HDO and s. 24 of the Housing Developers (Tribunal For Housing Purchaser Claims) Regulations 2010, which was created to regulate the operations of the Tribunal. The jurisdictional limitation of the Tribunal is expressly stated in s. 17 of the HDO.

[12] Pursuant to cl. 17(1) and (2) of the SPA, it was agreed that the property shall be completed by the appellant and the appellant to deliver vacant possession of the same to the second and third respondents within 24 months from the date of the execution of the SPA ie, on 11 August 2008. In the event of failure to deliver the property within the stipulated time, the appellant shall pay the second and third respondents LAD to be calculated pursuant to the SPA.

[13] However, the property was only completed on 20 April 2010 as recorded in the certificate of practical completion ("CPC") by DK Architect pursuant to cl. 19(1) of the SPA - see p. 121, vol. 3, part C, record of appeal (RR).

[14] Pursuant to cl. 19(1) of the SPA, the appellant then delivered vacant possession of the said property to the second and third respondents *vide* letter dated 21 April 2010 - p. 122, vol. 3, part C, RR. Under cl. 19(2) of the SPA, 14 days hereafter whether or not the purchaser has actually entered into possession or occupation of the said property, the purchaser shall be deemed to have taken delivery of vacant possession and the vendor thereafter shall not be liable for any loss or damage to the said property or to the fixtures and fittings therein.

[15] The appellant then applied for the issuance of occupation permit ("OP") pursuant to cl. 19(1) on 14 September 2010 - see pp. 123-124, vol. 3, part C, RR.

[16] The appellant then issued another notice to take vacant possession of the property on 17 May 2011. However, the second and third respondents refused to take vacant possession of the same - see pp. 125-126, vol. 3, part C, RR.

[17] The appellant informed the second and third respondents that the OP has again been applied on 24 May 2011 - see p. 127, vol. 3, part C, RR.

[18] The appellant sent another notice of delivery of vacant possession on 26 May 2011 pursuant to cl. 19(2) - see p. 128, vol. 3, part C, RR.

[19] On 8 June 2011, Majlis Perbandaran Sibu informed the appellant that their application for OP cannot be approved and they were required to rectify all the defects - see pp. 129-130, vol. 3, part C, RR.

[20] The appellant, through their architect applied for the final issuance of OP on 12 December 2011 - see p. 131, vol. 3, part C, RR.

[21] The OP for the property was finally issued on 14 November 2012 by the Majlis Perbandaran Sibu - see p. 132, vol. 3, part C of RR.

[22] It is not disputed that the appellant was late in the delivery of vacant possession of the said property to the second and third respondents. Consequently, both the respondents filed their claim for LAD to the Tribunal (the first respondent) for the late delivery of vacant possession of the said property at the rate of RM400 per month (pro rateable daily) from the completion date to the date of delivery of vacant possession of the said property, pursuant to cl. 17(1), (2) and (3) of the SPA.

[23] At the hearing before the first respondent, the first respondent had however, computed the LAD from the initial completion date, ie, 11 August 2008 to the date of issuance of occupation permit ie, on 14 November 2012.

[24] The applicant contends that the first respondent's computation of the LAD was wrong and it has affected the appellant, adversely as follows:

(i) The first respondent's computation:

- From 11 August 2008 to date of issuance of OP ie, 14 November 2012 = 51 months x RM400 = RM20,400

(ii) The appellant's computation:

- From 11 August 2008 to date of issuance of notice to take vacant possession ie, 21 April 2010 = 20 months and 10 days x RM400 = RM8,133.30.

[25] Dissatisfied with the aforesaid award, the appellant filed this application for judicial review under O. 53 of the Rules of Court 2012 to review and quash the said first respondent's award.

The Decision Of Learned Judge

[26] Her Ladyship held, *inter alia*, at pp. 27, 28, vol. 1, part A, RR of her grounds of judgment, as follows:

> ... Reading the SPA as a whole, it is clear that clause 17 is a specific provision dealing with the eventuality of the failure to deliver vacant possession within the stipulated time. As mentioned earlier, by its sub-clause (1), the applicant is contractually bound to complete the construction of the building and shall hand over vacant possession within 24 months of the date of the SPA. As we have seen the applicant failed to deliver vacant possession within the stipulated time. It is for such eventuality that sub-clause (2) comes into play. ... The plain meaning of the provisions of sub-clause (2) is that in the event of failure by the applicant to deliver vacant possession within 24 months of the date of SPA, the applicant shall pay to the respondents LAD until the date of completion of the building. To my mind, the meaning to be attributed to the words 'date of completion' in sub-clause (2) is governed by sub-clause (3). Sub-clause (3) reads: 'For the purpose of this clause, the Building is deemed to be completed when the Certificate stipulated in clause 20 below has been issued'. It is to be noted that sub-clause (3) begins with the phrase 'For the purpose of this clause'. Giving the words 'for the purpose of this clause' their plain meaning, sub-clause (3) is meant to apply specifically to clause 17. By sub-clause (3) it is provided that the building is deemed to be completed when the Occupation Permit as stipulated in clause 20 has been issued. By extension therefore, the 'date of completion' in sub-clause (2) means the date when the Occupation Permit as stipulated in clause 20 has been issued. Hence, in my view, the Tribunal has not erred in computing LAD from the initial completion date (14.8.2008) to the date of issuance of the Occupation Permit on 14.11.2012.

[27] In short, Her Ladyship had ruled that the meaning of 'the date of completion in cl. 17(2) of the SPA is the date that the OP is issued under cl. 20 of the SPA'.

A

The Appeal Before Us

[28] Learned counsel for the appellant submitted that the 'date of completion' of the said building is the date of issuance of the 'certificate of practical completion' (CPC) because cl. 19(1) of the SPA clearly stipulates that 'Upon the issuance of the CPC by the architect certifying that the construction of the said building has been duly completed ...' and the only person qualified to certify the completion of the building is the architect and not the council as can be seen from the contents of the CPC. The application for the issuance of OP (Form F) further confirmed that the architect is the only person qualified to certify the completion of the building.

B

C

[29] Learned counsel further reiterated that under sub-cls. 17(1) and 17(2), the appellant is only under an obligation to complete the building and to hand over vacant possession of the same pursuant to cl. 19(2) of the SPA, by issuing a notice to take vacant possession of the said building to the second respondent within 24 months from the date of the SPA. Upon failure to do so, the appellant is to pay LAD for late delivery of vacant possession at the agreed rate computed from the 'initial completion date under the contract' until the 'date of completion'.

D

[30] The obligation of the appellant never extends to giving the 'right of occupation' within 24 months as distinct from the 'right of possession'. The sixth schedule of the SPA which referred to cl. 17(2) states that the 'pre-estimated liquidated damages' payable under the SPA is for 'payment by vendor in default of handing over of vacant possession and not failure to give the right of occupation'. This payment of LAD only extends from the initial completion date until the date of issuance of CPC under cl. 19(1) and not until the date of issuance of OP under cl. 20.

E

F

[31] The aforesaid submissions by learned counsel for the appellant were essentially the findings of the learned judge in the four other appeals alluded to earlier where the decision heavily favoured the appellant.

G

[32] Learned counsel for the appellant also echoed the further findings of the learned judge in the said four other appeals when he submitted that cl. 17(3) is not a final and conclusive clause and it is only a deeming provision creating rebuttable presumption. Learned counsel relied on *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 and *Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2014] 8 CLJ 865, to fortify his arguments. Finally, it was submitted that cl. 17(3) is not a *non-obstante* provision as it does not contain the preposition 'notwithstanding' and therefore the clause is not to be read in isolation but must be read subject to cl. 19(1). The definition of completion must therefore be drawn from cl. 19(1), rebutting the presumption of the deeming provision of cl. 17(3) of the SPA.

H

I

[33] Learned counsel for the appellant submitted the further findings of the said learned judge that the SPA makes a clear distinction between the 'right of possession' and the 'right of occupation' in that what has been promised by the appellant under the standard Form G contract is that within 24 months, the appellant would complete and to give vacant possession of the said building to the second respondent and third respondent but not the right of occupation within 24 months. *South East Asia Brickworks Sdn Bhd v. Maria Antonette* [1974] 1 LNS 158; [1979] 1 MLJ 46; *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v. Cheow Chong Thai* [1988] 1 LNS 74; [1988] 3 MLJ 221; and *Maxisegar Sdn Bhd v. Veronica Lee Ha Ling & Ors* [2009] 6 CLJ 247; [2011] 5 MLJ 913, were cited to lend support thereof.

Issue For Determination

[34] Hence, in our view, the only issue before us is this: whether the computation of the LAD should commence within 24 months from the date of the SPA (11 August 2008) until the date of delivery of vacant possession of the property under cl. 17 (21 April 2010) or within 24 months from the date of the SPA (11 August 2008) until the date of the issuance of the OP under cl. 20 (14 November 2012) of the SPA.

Our Decision

[35] For ease of reference, we reproduce the relevant clauses planking the dispute before us.

Clause 17 of the SPA provides as follows:

> Handing Over Vacant Possession
>
> (1) Subject to Clause 18 herein below and provided that the Purchaser duly pays the instalments as provided and at the time set out in Clause 3 and duly pays all sums and monies due or payable by him to the Vendor pursuant to this Agreement, and provided further that the Purchaser shall have performed and observed, and shall not be in breach of any of the terms and conditions on his part to be performed and observed contained in this Agreement, the said **Building shall be handed over to the Purchaser** within twenty-four (24) calendar months from the date of this Agreement.
>
> (2) If the **Vendor fails to hand over vacant possession** of the said Building within the period stipulated in Sub clause (1), the Vendor shall pay to the Purchaser monthly such sum as specified in the Sixth Schedule herein as the agreed pre-estimated liquidated damages until the date of completion of the said Building and if the said Building is completed on any day before the end of the month then the liquidated damages shall be calculated *pro rata* for that particular month.
>
> (3) **For the purpose of this Clause, the Building is deemed to be completed when the Certificate stipulated in Clause 20 below has been issued**. (emphasis added).

Clause 19 provides:

> Manner of Delivery of Vacant Possession
>
> (1) Upon the issuance of a *Certificate by the Vendor's Architect certifying that the construction of the said Building has been duly completed and water and electricity are available for connection to the said Building and the Vendor has applied for the issuance of the Certificate of Fitness for Occupation* from Appropriate Authorities and the Purchaser having paid all monies under Clause 3(1) in accordance with the Fourth Schedule and **all other monies due under this Agreement** and the Purchaser having performed and observed all the terms and covenants on his part under this Agreement, the Purchaser shall have possession of the said Property.
>
> (2) Upon the expiry of fourteen (14) days from the date of a notice from the Vendor requesting the Purchaser to take possession of the said Property, whether or not the Purchaser has actually entered into possession or occupation of the said Property, the Purchaser shall be deemed to have taken delivery of vacant possession and the Vendor thereafter shall not be liable for any loss or damage to the said property and/or to the fixtures and fittings therein. (emphasis added)

Clause 20 provides:

> Certificate of Fitness For Occupation
>
> The Vendor shall, pursuant to the application for Certificate of Fitness for Occupation at its own cost and expense, duly comply with all the requirements of the Appropriate Authorities which are necessary for the issuance of the Certificate of Fitness for Occupation in respect of the said Building.

[36] In *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141, the Federal Court held that:

> Now, cl. 23 is part of a statute based contract. In this country, the relation between a house buyer and a licensed developer is governed by the housing developers legislation. Its object is to protect house buyers against the developers. **A developer must execute the agreement set out in the schedule to the relevant subsidiary legislation. He cannot add other clauses in it**. (emphasis added)

[37] The SPA in the present appeal, in particular cl. 17(3), is equally not a mere agreement between two contracting parties but a statutorily sanctioned provision. It is trite that the SPA is substantially governed by reg. II and Schedule G of the Housing Developers (Control and Licensing) Regulations 1989 ("HDCL Regulation"). They are actually provisions of Schedule H that had been imposed by law upon the parties and hence, are statutory provisions in that sense.

[38] Clause 17(3) of the SPA, which is peculiar only to the State of Sarawak, obviously is not there as a decorative item nor a product of verbosity. The formula in the said cl. 17 was determined by the State Cabinet of Sarawak, led by its State Minister of Housing, designed to protect home

buyers after balancing the interests of the buyers and developers in Sarawak. It is meant to be implemented and executed in the event of breaches in respect of cl. 17(1) and (2). Hence, it is only appropriate to adopt in all the circumstances of the case, an interpretation that is in accord with s. 17A of the Interpretation Acts 1948 and 1967 as were done by the learned judges in *Chinaya Ganggaya v. Sentol Raya Sdn Bhd* [2008] 3 CLJ 23 and *Hariram Jayaram & Ors v. Sentul Raya Sdn Bhd* [2002] 4 CLJ 796. The said s. 17A provides:

> 17A. Regard to be had to the purpose of the Act.
>
> In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

[39] As stated earlier, learned counsel for the appellant had submitted that upon failure to deliver vacant possession of the said property to the second and third respondents within 24 months from the date of the SPA (11 August 2008, as the SPA was entered on 12 August 2006) pursuant to cl. 17(1), the appellant, pursuant to cl. 17(2), is only to pay LAD for the said late delivery at the agreed rate computed from the initial completion date (11 August 2008) until the date of completion signified by the issuance of a notice to take vacant possession of the said property pursuant to cl. 19(1) of the SPA. Accordingly, the LAD is to be paid only from 11 August 2008 until 21 April 2010 when vacant possession of the said property was delivered *vide* the said notice.

[40] However, we were of the view that such submission offends s. 17A of the Interpretation Acts. In addition, to accept such argument is to make nonsense of the purpose of the HDCL Regulations or rather its parent Act, the Housing Developers Act and would render the said cl. 17(3) of the SPA obtuse and redundant, defeating the paramount objective of inserting the said provisions into the SPA.

[41] It is our further view that the purport of cl. 17(3) of the SPA is plain and clear. It strengthens the scope of cl. 17(2) by offering a definitive meaning of 'the date of completion of the said building' appearing therein. It simply means that what amounts to 'date of completion' now is the delivery of a completed and habitable building fit for human occupation together with the certificate of fitness for occupation (CF) issued under cl. 20 of the SPA.

[42] In addition, it now appears that the mere delivery of vacant possession of the said property by way of giving notice of vacant possession to the buyers under cl. 19(1) and (2) is no longer sufficient to constitute completion. The requirement has now been modified in favour of the house buyers, providing additional protection from further victimisation by unscrupulous developers by the insertion of cl. 17(3), which we think that the same, read as a whole in the context of the entire SPA and not in isolation as suggested

fervently by learned counsel for the appellant, reflects the will of the contracting parties. If this is going to hurt the housing industry, it is for the developers to go back to the round table to trash the problem with those in authority.

[43] In constructing the said cl. 17(3), at the risk of being repetitive, the learned judge had said at pp. 27, 28 of her grounds of judgment, of vol. 1 part A, RR:

> To my mind, the meaning to be attributed to the words 'date of completion' in sub-clause (2) is governed by sub-clause (3). Sub-clause (3) reads: 'For the purpose of this Clause, the Building is deemed to be completed when the certificate stipulated in clause 20 below has been issued.' It is to be noted that sub-clause (3) begins with the phrase 'For the purpose of this clause.' Giving the words 'for the purpose of this clause' their plain meaning, sub-clause(3) is meant to apply specifically to clause 17. By sub-clause (3) it is provided that the building is deemed to be completed when the Occupation Permit as stipulated in clause 20 has been issued. By extension therefore, the 'date of completion' in sub-clause 2 means the date when the Occupation Permit as stipulated in clause 20 has been issued. Hence, in my view, the Tribunal had not erred in computing the LAD from the initial completion date (14.8.2008) to the date of issuance of the Occupation Permit on 14.11.2012.

[44] We were entirely on all fours with the learned judge on the interpretation of the said cl. 17(3). There is no ambiguity in the said clause. It should be given its plain and ordinary meaning as interpreted by Her Ladyship and be given its legal effect, having regard to the purpose of the Housing Developers Act and the Regulation thereunder upon which cl. 17(3) was planked.

[45] On construction of contract, the Court of Appeal in *Mulpha Pacific Sdn Bhd v. Paramount Corporation Bhd* [2003] 4 CLJ 294 at p. 301 stated:

> In *The Royal Selangor Golf Club v. Anglo-Oriental (Malaya) Sdn Bhd* [1990] 1 CLJ 995, Lim Beng Choon J said:
>
> > In considering the disputes of the parties I must first of all bear in mind the general principles of construction of contract as enunciated in the *National Coal Board v. Wm Neill & Son (St Helen)* [1984] 1 All ER 555 where it is said at p. 560:
> >
> > > The first two issues involve the construction of the contract. I bear in mind the principles of construing a contract. The relevant ones for the purpose of this case are: (1) construction of a contract is a question of law; (2) where the contract is in writing the intention of the parties must be found within the four walls of the contractual documents; it is not legitimate to have regard to extrinsic evidence (there is, of course, no such evidence in this case); (3) a contract must be construed as at the date it was made: it is not legitimate to construe it in the

> light of what happened years or even days later; (4) the contract must be construed as a whole, and also, so far as practicable, to give effect to every part of it.

In *Central Bank of India v. Hartford Fire Insurance Co. Ltd.* AIR [1965] SC 1288, the Supreme Court of India lays stress on the second principle advocated in the *Wm Neill & Sons (St. Helens) Ltd* case when it says at p. 1290:

> Now it is common place that it is the court's duty to give effect to the bargain of the parties according to their intention and when that bargain is in writing the intention is to be looked for in the words used unless they are such that one may suspect that they do not convey the intention correctly. If those words are clear, there is very little that the court has to do. The court must give effect to the plain meaning of the words however much it may dislike the result.

[46] In coming up with her decision (at para. 42), we were satisfied that she had adhered to the principles discussed above. The plain meaning of the words in cl. 17 was given its desired effect. The said clause obviously cannot be read subject to cl. 19(1) as suggested by learned counsel for the appellant as to do so would render cl. 17(3) inoperable, redundant and unable to serve its purpose of being enacted therein and hence, should not be there at all in the first place. It is a stand-alone provision as submitted by learned counsel for the first respondent which we embraced whole-heartedly.

[47] The further consequential effect of applying or subjecting cl. 17(3) of the SPA to the provision of cl. 19(1) would be the enlargement or improvement of the terms of the SPA, an exercise strongly detested by the appellant, favouring only one side of the divide ie, the appellant, leaving the home buyers out in the cold. It would equally offend the purport of HDCL Regulation and oust the primary purpose of having cl. 17(3) in the agreement. This surely cannot be the intention of the parties when they entered the SPA.

[48] On the issue of enlargement and improvement of the contract and the deeming provision of cl. 17(3) of the SPA, the learned judge had correctly summarised the position as follows, at pp. 25, 26, of the grounds of judgment, vol. 1, part A, RR:

> The bone of contention of the applicant is that the Tribunal had improved the contract in construing the words 'until the date of completion' in clause 17(2) to mean until the date the OP is issued and has thus made an error of law. The applicant argues that clause 17(3) of the SPA is not a final and conclusive clause but is merely a deeming provision which in law created nothing but a rebuttable presumption. Being a rebuttable presumption, clause 17(3) is not to be construed in isolation, but, must be construed in the totality of its surrounding provisions i.e. the entire contract. There is a distinction between a 'deeming' provision and a 'final and conclusive' provision. The former 'presumes' a fact while the latter 'concludes' a fact: see *Cempaka Finance Bhd v. Ho Lai Ying & Anor* [2006] 3 CLJ 544 Federal Court which illustrates the effect of a conclusive clause.

A [7] The applicant submits that clause 17(3) falls in the former category and it merely presumes a fact. The Tribunal had fallen into error in construing clause 17(3) as a final and conclusive clause as opposed to its true nature of being merely a 'deeming' provision. What is the rebuttable presumption in this instance? That the subject property is 'deemed' completed when an Occupation Permit is issued. Being a 'deeming provision' it means that
B unless there are other facts or evidence to show otherwise or in the absence of any evidence to show the contrary position, then the presumption would stand. The applicant submits that judging the contract as a whole, clause 17(1) and (2) reveal that the applicant is only under an obligation to (i) complete the building; and (ii) hand over vacant possession of the building to the 2nd and 3rd respondents within
C 24 months from the date of the SPA, failing which the applicant is to pay to the 2nd and 3rd respondents LAD at the agreed rate as per the 6th Schedule from the 'initial completion date' under the SPA until the 'date of completion (vacant possession)'. The applicant submits that such obligations cannot be enlarged.

D **[49]** The learned judge's finding in respect of the same are as follows, at p. 26, of the same volume:

[8] With due respect, I do not agree with the applicant's contentions. The applicant faults the Tribunal with having improved or enlarged the contract in computing LAD from the initial completion date (14.8.2008)
E to the date of issuance of the OP (14.11.2012), but in my view, it is the applicant, by the arguments outlined above, that is attempting to improve or enlarge the terms of the contract. The Tribunal had construed and applied the provisions of clause 17 to compute the LAD and in my judgment, the Tribunal has neither erred in resorting to clause 17 nor erred in the construction and application of it. It needs to be reiterated
F that the sole question of determination by the Tribunal was what was the contractual time period for which the applicant was liable to pay LAD to the respondents as a consequence of the failure of the applicant to hand over vacant possession by the initial completion date.

[50] Again, we were entirely with Her Ladyship and had no further
G findings but suffice for us to add that it is trite law that we are not in the business of rewriting the terms and conditions of the contract between the parties - see *Mature Land Sdn Bhd v. Atlantic Plantation Sdn Bhd* [2012] 1 LNS 961; [2013] 4 MLJ 586.

[51] The appellant submitted that there is a distinction between 'right of
H possession' and 'right of occupation' and what has been promised by the appellant under the standard Form G contract is that within 24 months, it would complete and confer the right of possession to the second and third respondents by delivering upon them vacant possession of the property pursuant to cl. 19(1) of the SPA. However, this does not entail the
I conferment of the right of occupation within that 24 months on account that the OP under cl. 20 has yet to be applied. The property is considered fit for occupation and could be occupied only upon the issuance of the OP.

[52] Learned counsel for the appellant applied *Syarikat Lean Hup (Liew Brothers) Sdn Bhd v. Cheow Chong Tai* [1988] 1 LNS 74; [1988] 3 MLJ 221 and *Maxisegar Sdn Bhd v. Veronica Lee Ha Ling & Ors* [2009] 6 CLJ 247; [2011] 5 MLJ 913 to fortify his argument. However, we found these two cases to be of no assistance on account that firstly, the contracts in these two cases did not have identical or similar provision as in cl. 17(3) of the SPA in the present appeal and secondly, the provision being disputed in both cases carried a proviso stating that 'such possession shall not give the purchaser the right to occupy and the purchaser shall not occupy the said parcel until such time as the certificate of fitness from occupation is issued' which is non-existent in the SPA of the present appeal.

[53] In our view, in the present appeal, the right of occupation is conferred upon the second and third respondents by virtue of cl. 17 wherein the appellant is encumbered not only to deliver vacant possession of the said property within 24 months from the date the SPA was entered under cl. 17(1) but also, under cl. 17(3) to procure the issuance of the certificates stipulated under cl. 20 within the same period. Only then is the property considered fit for occupation and could hence be legally occupied. Anything less than these would infringe the SPA and the appellant is liable to pay damages as the second and third respondents cannot legally enjoy the use of the property. Hence, there is no basis for the appellant to say that cl. 17 of the SPA does not confer any right of occupation of the said property to the second and third respondents.

Conclusion

[54] We dismissed the appellant's appeal upon all the reasons given above. Correspondingly, we also allowed the appeals by Tribunal for Housing Purchaser Claims, being the appellants, in the four other related appeals ie, Civil Appeals No. Q-01-475-12-2014; Q-01-476-12-2014; Q-01-477-12-2014 and Q-01-478-12-2014. We also award costs in the sum of RM5,000 for all the appeals and the deposits for the lodgement of these appeals are refunded.